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d/b/a OpenSea, a New York Corporation*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT ARMIJO,

Plaintiff,

VS.

OZONE NETWORKS, INC. d/b/a OPENSEA, a New York Corporation, YUGA LABS, LLC d/b/a BORED APE YACHT CLUB, a Delaware limited liability company, LOOKSRARE; and DOES 1 to 50,

Defendants.

CASE NO. 3:22-CV-00112-MMD-CLB

**DEFENDANT OZONE NETWORKS,
INC.'S REPLY IN SUPPORT OF ITS
MOTION FOR LEAVE TO SUBMIT
SUPPLEMENTAL AUTHORITY**

1 Plaintiff makes various arguments in opposing Defendant Ozone Networks, Inc. d/b/a
 2 OpenSea (“OpenSea”)’s Motion for Leave to Submit Supplemental Authority, none of which
 3 refutes OpenSea’s showing of good cause. The Motion should be granted.

4 *First*, Plaintiff’s suggestion that the Court might not take judicial notice of OpenSea’s
 5 terms is mistaken. As set forth in OpenSea’s Request for Judicial Notice, OpenSea’s Terms of
 6 Service are properly subject to judicial notice because, *inter alia*, Plaintiff’s use of OpenSea was
 7 conditioned on accepting the publicly accessible Terms, and his claims necessarily depend on
 8 them. Indeed, courts routinely take judicial notice of publicly available website terms and
 9 policies, as did the court in *Diep v. Apple*. *See* ECF No. 73 at 2-5 (collecting authorities); *see also*, e.g., *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (a document “may be
 10 incorporated by reference into a complaint if . . . the document forms the basis of the plaintiff’s
 11 claim”); *Lemmon v. Snap, Inc.*, 2019 WL 7882079, at *4-5 (C.D. Cal. Oct. 30, 2019) (considering
 12 Snap’s Terms on motion to dismiss as “all Snapchat users must agree to Snap’s Terms”).

14 *Second*, Plaintiff never disputes (including in his Opposition) that on several occasions he
 15 voluntarily agreed to OpenSea’s Terms—including in connection with his initial purchase of at
 16 least one of the NFTs at issue in this action—and that he is generally bound by the Terms. (*See*
 17 Decl. of Ian L. Meader, ECF No. 72, ¶¶ 5-8 (establishing that Plaintiff was at least twice required
 18 to check a box next to the statement that, “By checking this box, I agree to OpenSea’s Terms of
 19 Service”); OpenSea’s Motion to Dismiss Am. Compl. (“MTD”), ECF No. 71, at 4-5, 19-20.)

20 *Third*, Plaintiff’s argument that the Terms do not cover conduct taking place anywhere
 21 other than on the OpenSea platform (a) concedes that the harm alleged did not actually occur on
 22 OpenSea; and (b) is incorrect because the exculpatory provision contained in the Terms applies
 23 broadly and unambiguously to “ANY” damages or claims arising from “THIRD PARTY
 24 ACTIVITIES,” including “PHISHING” attacks, no matter where they take place. (MTD at 20-
 25 22.) Further, the Terms *indisputably* cover the third-party attacker’s listing of Plaintiff’s NFTs
 26 using the OpenSea platform, which Plaintiff insists is the true focus of his claims. (*But cf.*
 27 OpenSea’s Reply ISO Motion for Stay, ECF No. 92, at 4-8 (explaining that Plaintiff’s allegations
 28 themselves demonstrate that OpenSea does not control the NFT community).)

1 DATED this 20th day of September, 2022.

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/s/ Justin J. Bustos

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 20th day of September 2022, caused a copy of the foregoing **DEFENDANT OZONE NETWORKS, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY** to be transmitted by electronic service in accordance the Court's CM/ECF e-filing system, addressed to:

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